DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

508

FILE: B-183808
A-51604

DATE: May 15, 1975

MATTER OF: Status of impounded Food Stamp Program appropriations obligated by court order

DIGEST:

Court order, entered prior to expiration of availability period for fiscal year 1973 Food Stamp Program appropriation, which required that the impounded balance of such appropriation be recorded as obligated under 31 U.S.C. § 200(a)(6), as a liability which might result from pending litigation, was effective to obligate the impounded 1973 appropriation balance and thereby prevent its lapse. Therefore, 1973 balance so obligated may be used during fiscal year 1976 without further appropriation action.

This decision to the Secretary of Agriculture responds to a request by the Acting General Counsel of the Department of Agriculture (DA) concerning whether the unexpended balance of approximately $278.5 million in the fiscal year 1973 appropriation for the Food Stamp Program may be used during fiscal year 1976 without further appropriation action as a result of the order issued by the United States District Court for the District of Minnesota in Joseph Bennett, et al. v. Earl L. Butz, et al., Civil Action No. 4-73 Civ. 284.

The unexpended balance in question derives from the fiscal year 1973 appropriation of $2.5 billion for the Food Stamp Program, Pub. L. No. 92-399, approved August 22, 1972, 86 Stat. 591, 610, which was available for obligation through June 30. 1973. Plaintiffs in Bennett alleged that the predicted unobligated balance in the 1973 Food Stamp appropriation was attributable to DA's failure to administer the program in accordance with the Food Stamp Act, including, inter alia, failure to properly implement the "outreach" requirements set forth in 7 U.S.C. § 2019(e)(5) (Supp. III, 1973). On June 25, 1973, the District Court granted plaintiffs' motion for preliminary injunctive relief and ordered, inter alia, that defendants:

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"1. shall no later than June 29, 1973, record as an obligation of the United States pursuant to 31 U.S.C. § 200(a) (6) and (8) all such sums appropriated for the Food Stamp Program for the fiscal year ending June 30, 1973, pursuant to Public Law 92-399, including the contingency reserve specified therein, which are not otherwise obligated as of that date or to become duly obligated thereafter, and,

"2. shall refrain from withdrawing any unobligated balance from said appropriation in any manner which would cause or permit the reversion of said unobligated balance to the general fund, and,

"3. shall retain all such sums obligated pursuant to paragraph one (1) of this order as an obligated balance against the appropriation referred to herein until further order of this Court."

The Court concluded that plaintiffs had raised substantial questions concerning administration of the Food Stamp Program, and that the June 25 order was necessary in light of 31 U.S.C. §§ 200(d) and 701 et seq. so as to prevent the unexpended balance from lapsing and reverting to the General Fund of the Treasury, with attendant irreparable injury to plaintiffs. Findings of Fact, ¶¶ 6-10; Conclusions of Law, ¶¶ 4, 7, 12-13 (filed June 25, 1973). The Court further stated that its order "constitutes documentary evidence of an obligation of the United States pursuant to 31 U.S.C. § 200(a)." Conclusions of Law, ¶ 9.

On October 11, 1974, the Court issued a final memorandum opinion wherein it held that the unexpended 1973 appropriation balance resulted from DA's noncompliance with the statutory outreach requirements and, therefore, had been unlawfully "impounded." 386 F. Supp. 1059, 1071. The accompanying final order required, inter alia:

"3. That defendants herein, their successors in office, agents and employees shall take all measures necessary to make available for present expenditure all surplus funds from the appropriation for the Food Stamp Program for fiscal year 1973 which have been retained as an obligated balance against said appropriation pursuant to the order of this Court dated June 25, 1973." Id. at 1072.

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DA's Acting General Counsel advises that no appeals were taken by the Government from either order in Bennett and, therefore, they constitute the final judgment of the Court. As such, the Acting General Counsel suggests that the judgment must be complied with. He expresses the position that no further appropriation action by the Congress is necessary; and, to the contrary, that an attempt to secure additional appropriation action might be construed as a contempt of the Court's decree. Further, he points out that, by section 3(j) of the Act approved August 10, 1973, Pub. L. No. 93-86, 87 Stat. 248, the Food Stamp Act was amended to make appropriations thereunder available until expended. 7 U.S.C. § 2025 (Supp. III, 1973). In view of the foregoing, DA proposes to expend the 1973 balance here involved during fiscal year 1976, and to notify the cognizant appropriations subcommittees of this intent in connection with its 1976 budget presentations. The Department of the Treasury has informally advised DA that it is inclined to accept this approach, but would rather defer to the judgment of our Office in the matter.

The principal statutory provision bearing upon the instant matter is section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200 (1970). This statute governs the recording of appropriation obligations, and provides in subsection (d):

> "No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law."

Initially it must be pointed out that, while the Court's disposition in Bennett constitutes a final judgment, to the extent that the expenditure of funds is mandated its implementation is still dependent upon an appropriation duly available therefor. See U.S. CONST. Art. I, § 9, cl. 7; Knote v. United States, 95 U.S. 149, 154 (1877); Reeside v. Walker, 52 U.S. (11 How.) 272, 289-292 (1850); Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988-89 (S.D. Cal. 1945), aff'd, 154 F. 2d 419 (9th Cir. 1946); cf., Glidden Company v. Zdanok, 370 U.S. 530, 569-70 (1962). 31 U.S.C. § 200(d) quoted above, expressly limits the authority to expend fixed year appropriations after expiration of their period of availability to the liquidation of obligations meeting the criteria set forth in subsection (a) of that section. Thus, in our view, the fundamental

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issue to be resolved is whether or not the Bennett court's June 25, 1973 order satisfied the criteria of 31 U.S.C. § 200(a); so as to preclude the balance of the impounded Food Stamp appropriation from lapsing on June 30 of that year.

The Court ordered the unexpended balance to be "record[ed] as an obligation" under subsections (a)(6) and (8) of 31 U.S.C. § 200, which provide:

> "(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of--
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> * * * * *
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> "(6) a liability which may result from pending litigation brought under authority of law; or
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> * * * * *
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> "(8) any other legal liability of the United States against an appropriation or fund legally available therefor."

The fundamental purpose of 31 U.S.C. § 200 was to counter the practice existing at the time of its enactment whereby some agencies applied overly broad concepts of "obligation" in order to minimize the amount of unexpended appropriation balances which would lapse after expiration of their period of availability for obligation. See, e.g., 51 Comp. Gen. 631, 633 (1972) and legislative history cited therein. The remedy was to limit the recording of obligations to those meeting the specific statutory criteria established in subsection (a). We have generally construed the section 200(a) criteria with a view toward this restrictive purpose. Thus our basic rule concerning the subsection 200(a)(6) criterion for recording obligations in the case of pending litigation is stated in 35 Comp. Gen. 185, 187 (1955), as follows:

> "Subsection 6 was included in section 1311(a) for the purpose of permitting obligations to be recorded in the case of land condemnation proceedings under the Declaration of Taking Act, 40 U.S.C. 258, and similar cases. See the Department of Defense's section by section analysis of section 1111 (the present section 1311) of H.R. 9936, 83rd Congress, as passed by the House of Representatives on page 994, Hearings before

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> the Committee on Appropriations, United States Senate, 83d Congress, 2nd Session on H.R. 9936. In land condemnation and similar cases, a liability of the Government has been established, the only question being an exact determination of the amount of the liability. An intent to permit obligations to be recorded in every case where litigation is pending against the Government, which may or may not result in a liability, cannot possibly be imputed to the Congress. In view thereof and since the overall purpose of section 1311 was to restrict the amounts recorded as obligations, it is our view that obligations may be recorded under section 1311(a)(6) only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability. In the cases mentioned in your letter, whether or not the employees are entitled to be reinstated on account of being wrongfully discharged, with resulting entitlement to 'back pay,' has not been determined and no definite liability on the part of the Government has been established."

We have not specifically addressed subsection 200(a)(6) since the above-quoted 1955 decision.

In assessing the effect of the June 25 order in Bennett, it must be recognized at the outset that 31 U.S.C. § 200 and related statutory provisions (see 31 U.S.C. §§ 701-708) comprise a highly technical, and somewhat esoteric, statutory system to control the accounting for and disposition of appropriation balances. As such, its operation has rarely been a subject of judicial consideration. However, these statutes have necessarily come before the courts in a number of recent actions concerning "impoundment." Several courts have followed the same approach as in Bennett by preliminarily ordering impounded funds to be obligated under 31 U.S.C. § 200(a) prior to expiration of their period of availability in order to prevent lapse. See, e.g., Guadamuz v. Ash, Civil Action No. 155-73 (D.D.C., Order for Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 29, 1973) (subsequent opinion and judgment reported at 368 F. Supp. 1233); National Council of Community Mental Health Centers, Inc. v. Weinberger, Civil Action No. 1223-73 (D.D.C., Order Granting Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 28, 1973) (subsequent opinion reported at 361 F.

Supp. 897); Commonwealth of Pennsylvania v. Weinberger, Civil Action No. 1125-73 (D.D.C., Order for Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 28, 1973). See also City of New York v. Train, 494 F. 2d 1033, 1049 (D.C. Cir. 1974), aff'd, 43 U.S.L.W. 4209 (U.S., February 18, 1975); State of Maine v. Fri, 486 F. 2d 713 (1st Cir. 1973).

In our view, the construction of section 200(a)(6) adopted in 35 Comp. Gen. 185, supra, is correct as applied to pending litigation generally. However, we also believe that anti-impoundment litigation must be considered unique in this context. As previously noted, the basic purpose of 31 U.S.C. § 200 was to remedy the administrative practice of overstating "obligations" in order to minimize the amount of lapsing appropriations. Co sidering this basic purpose, as well as the specific legislative history concerning subsection 200(a)(6), we concluded in 35 Comp. Gen. 185 that the Congress could not have intended to permit all potential liabilities as a result of pending litigation to be recorded as obligations. Of course, neither our prior decision nor the legislative history of section 200(a)(6) considered the possible effect of anti-impoundment litigation. The basic premise of such litigation is that the refusal of the Executive branch to use appropriations through the normal obligation processes is itself in derogation of the congressional design in providing appropriations. Consequently, the concern here is precisely the opposite of that underlying 31 U.S.C. § 200 i.e., the potential frustration of the will of Congress by underobligating, rather than overobligating, appropriations. In the context of this litigation, therefore, it would be incongruous to construe 31 U.S.C. § 200(a)(6) in a manner permitting its application to frustrate congressional objectives unless such a result is unavoidable by the express terms of the statute. We do not believe that it is. The granting of a preliminary order (in an action to compel the release of appropriation by the Executive branch) requiring the obligation of such appropriations reflects an independent judicial determination that the issues raised are at least substantial. Moreover, such an order, when entered within the period of appropriation availability, is consistent with normal concepts permitting obligations based upon bona fide fiscal year needs even though the obligation will not be liquidated until later. Cf. 33 Comp. Gen. 57, 61 (1953); 50 id. 589, 590-91 (1971).

For the foregoing reasons, it is our opinion that the June 25, 1973 order in Bennett is consistent with both the letter and spirit of 31 U.S.C. § 200(a)(6), and effectively established a valid obligation against the unexpended balance of the 1973 Food Stamp appropriation. Accordingly, the balance so obligated did not lapse and may be expended during fiscal year 1976.

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Finally, we have considered the possible application in the instant matter of section 501 of the Supplemental Appropriations Act, 1974, approved January 3, 1974, Pub. L. No. 93-245, 87 Stat. 1077, which provides:

> "Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Since [sic] appropriations shall remain available for obligation through the later of the day on which a final judicial determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal."

This provision was explained in the Senate Appropriations Committee's report on the legislation enacted as Pub. L. No. 93-245, S. Rep. No. 93-614, 34 (1973), as follows:

> "IMPOUNDMENT OF APPROPRIATED FUNDS
>
> "The Committee has included language to insure the availability for obligation of illegally impounded fiscal 1973 appropriations. Various cases brought after June 30, 1973, are now seeking to effect the release of these impounded funds. The intent of the Congress was clear that fiscal 1973 appropriations for certain Department of HEW activities be fully obligated in fiscal 1973. However, the Administration is now contending in these cases, that these funds, although unlawfully impounded, may not now be ordered obligated because they were brought after the close of the fiscal year. This issue is currently before the courts and need not be directly addressed. To avoid such a technical defense, however, this provision appropriates these impounded sums and makes them fully available for obligation pursuant to court order, and thus effectuates the original intent of the Congress." (Underscoring supplied.)

If section 501 applied in the instant matter, it would constitute a reappropriation of the impounded balance of the 1973 Food Stamp appropriation, to remain available until one year following the final disposition in Bennett, i.e., until October 11, 1975. However,

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section 501 applies only where reappropriation is "necessary" to remedy fiscal year 1973 impoundments found to be unlawful. In view of our conclusion that the June 25 order in Bennett constituted a valid obligation of the original appropriation, we do not believe that section 501 need be relied on here. Rather, it appears that this section was designed in effect to validate court orders in anti-impoundment actions entered after expiration of the appropriation availability period which, absent such reappropriation, would raise serious issues under Article I, § 9, cl. 7 and the cases cited hereinabove. See, e.g., State of Louisiana v. Weinberger, 369 F. Supp. 856, 859-860 (E.D. La. 1973); Commonwealth of Pennsylvania v. Weinberger (Civil Action No. 1606-73), 367 F. Supp. 1378, 1385-87 (D.D.C. 1973); National Ass'n of Regional Medical Programs, Inc. v. Weinberger, Civil Action No. 1807-73 (D.D.C., filed February 7, 1974), for anti-impoundment actions in this category.

We are sending a copy of this decision to the Secretary of the Treasury.

Comptroller General
of the United States